

Blockchain Law

Meta-Claims From the Metaverse

Robert A. Schwinger, *New York Law Journal* — July 26, 2022

Is it overreach to extend long-familiar laws and procedures from our analog courts to activity in this new virtual domain?

The explosion of activity and interest in “the metaverse” is now giving rise to disputes about that realm. Yet paradoxically these disputes have begun to take shape in the courts of our physical world.

Is it overreach to extend long-familiar laws and procedures from our analog courts to activity in this new virtual domain? Or should society feel free to paraphrase the poet Robert Browning and ask of this new metaphorical world, “if the courts’ reach cannot exceed their grasp, then what’s a meta for?” To date, it appears that judges have not hesitated to grasp onto this new realm and address its issues in our familiar courts of the old.

The Metaverse: Can We Define It?

For many people at present, the little they understand of “the metaverse” tends to come from having seen movies such as “The Matrix” series, “Ready Player One,” “Minority Report,” “Avatar,” or maybe even “Tron,” going back to the 1980s.

Videogames like Fortnite, Second Life and World of Warcraft also provide a vision to their players of what a metaverse experience might be.

But beyond such pop culture depictions and experiences, what is the “metaverse”? That may not be easy to say. The metaverse is described in [Wikipedia](#) as being a “hypothetical iteration of the Internet as a single, universal and immersive virtual world that is facilitated by the use of virtual reality (VR) and augmented reality (AR) headsets a network of 3D virtual worlds focused on social connection.”

An alternative description is offered by Eric Ravenscraft, “[What Is the Metaverse, Exactly?](#)” *Wired*, April 2, 2022, who states: “Broadly speaking, the technologies companies refer to when they talk about ‘the metaverse’ can include virtual reality—characterized by persistent virtual worlds that continue to exist even when you’re not playing—as well as augmented reality that combines aspects of the digital and physical worlds. However, it doesn’t require that those spaces be exclusively accessed via VR or AR.”

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The commercial world seems to be marching forward into the metaverse, however it might be understood. Earlier this year, for example, it was reported that a law firm had “bought a digital plot of land and is opening a virtual office” in the metaverse. Bruce Love, [“Arent Fox Buys Property in the Metaverse, Becoming First Big Law Firm With Serious Presence in the Virtual World,”](#) Am. Lawyer, Feb. 15, 2022. Reportedly these law offices are “currently being built,” and “will be a place for lawyers and clients to meet for business or social occasions and also a place to share information.” Visitors, it is said, “can enter the office by walking down the street using their browser or virtual reality equipment and entering the offices through the front door.” The office is said be “in the Fashion/Retail district” of a metaverse called Decentraland, reportedly “to be close to clients.”

Not to be outdone, musician, fashion designer and entrepreneur Kanye West recently filed for his “Yeezus” trademark to extend to “metaverse experiences.” Andrew Hayward, [“Kanye West Stakes Claim for NFT and Metaverse Trademarks,”](#) Decrypt, June 1, 2022. And in a troubling development, on May 31, 2022, a nonprofit advocacy group called Sum of Us published a report titled [“Metaverse: another cesspool of toxic content,”](#) that reported on metaverse experiences which sadly included “[v]irtual groping and gang-rape” and “[s]exual, homophobic and racist comments” directed toward metaverse participants through their on-screen avatars.

Yet at the same time, some dispute that any metaverse can even be said to exist at this time. According to Cecilia D’Anastasio, [“Video Games Already Do What the Metaverse Just Promises,”](#) Wired (Jan. 10, 2022): “There is no metaverse. At least not yet. No one really agrees on what a metaverse is, but averaging together the more credible definitions yields a persistent, social cyberspace that intersects with the IRL [in real life] economy and integrates with other online platforms. Right now, nothing is doing this at any notable scale.” See also Will Oremus, [“In 2021, tech talked up ‘the metaverse.’ One problem: It doesn’t exist,”](#) Wash. Post, Dec. 30, 2021 (terming the metaverse “an explosion of hype” involving “rebranding existing technologies as building blocks for the metaverse, while leaving intact the corporate walls that make a true metaverse impossible.”). A more recent article also complained that while “verisimilitude is a crucial part of [the]

vision of the metaverse: an immersive ‘embodied internet’ where users will feel like they’re inhabiting a space instead of just looking at it,” the hardware and headsets necessary to achieve this vision are still “wildly impractical.” Chris Velazco, [“A picture-perfect metaverse is years away. Meta’s prototypes prove it,”](#) Wash. Post. June 20, 2022.

The Metaverse as Defined or Described by Courts

Court rulings do not do much better in terms of making the concept of the metaverse easier to grasp. To date there have only been four federal court decisions that even mention the term “metaverse” in the substance of their rulings.

In one recent ruling, *Doe v. Roblox*, 2022 WL 1459568 (N.D. Cal. May 9, 2022), the defendant “own[ed] and operate[d] an online ‘metaverse’ in which users control avatars of themselves. Users can purchase an in-game currency and spend it on virtual items for their avatars, some of which are generated by other users.” The complaint alleged that in this metaverse “users generate a three-dimensional virtual world,” “generat[ing] content like avatars of themselves, apparel for the avatars, and other virtual objects.” The metaverse was alleged to use “an in-game currency that can be purchased with real money” in order “to purchase virtual items,” either from the metaverse operator or that were “created by other users.” This metaverse, said the court, “is comfortably classified as an online entertainment service.”

The metaverse was discussed but not really described in a ruling in another very recent case just over a week later, *Hermès Int’l v. Rothschild*, 2022 WL 1564597 (S.D.N.Y. May 18, 2022). The court cited the complaint in that case as alleging that “[f]ashion brands are beginning to create and offer digital replicas of their real-life products to put in digital fashion shows or otherwise use in the metaverse.” The court also noted an interview in which the defendant suggested that the difference between the metaverse and real life is “getting a little bit blurred now because we have this new outlet, which is the metaverse, to showcase ... [products] in our virtual worlds, and even just show them online.” The decision also noted in passing that the defendant “ha[d] a separate project under a different name that allow[ed] NFT owners to interact in the metaverse.”

A more wide-ranging discussion of the metaverse appeared in *Epic Games v. Apple*, 559 F. Supp. 3d 898 (N.D. Cal. 2021). The court there stated in a post-trial ruling that “based on the record, the concept of a metaverse is a digital virtual world where individuals can create character avatars and play them through interactive programmed and created experiences.” It cited the testimony of plaintiff’s principal that a metaverse is “a realistic 3D world in which participants have both social experiences, like sitting in a bar and talking, and also game experiences.”

The court concluded that “a metaverse both mimics the real world by providing virtual social possibilities, while simultaneously incorporating some gaming or simulation type of experiences for players to enjoy.” It “is a virtual world in which a user can experience many different things—consume content, transact, interact with friends and family, as well as play,” but “game play need not be a part of a user’s metaverse experience, which is more to mimic the reality of life than to present game play.”

The court noted that the concept of the metaverse also was “evolving,” shifting from being primarily developer-created to being user-created. “[T]he metaverse, as an actual product, is very new and remains in its infancy. At this time, the general market does not appear to recognize the metaverse and its corresponding game modes ... as anything separate and apart from the video game market.” Indeed, the court later observed that this state of affairs might be part of “an ongoing trend of converging entertainment mediums where the lines between each medium are beginning to mesh and overlap.”

In a previous ruling in the same litigation, *Epic Games v. Apple*, 493 F. Supp. 3d 817 (N.D. Cal. 2020), the court said little about the nature of the metaverse but noted that the plaintiff’s claims that it was injured by being excluded from defendant’s app store arose in part from “its ongoing ambitions in the creation of a metaverse.” Plaintiff’s theory of injury was tied to an argument that the defendant’s alleged conduct caused plaintiff “difficulty in creating and sustaining a metaverse in the Fortnite community.”

The Metaverse Crossing Over Into Real Life

Can there be real-world claims that arise from what takes place in the metaphorical, virtual or fantasy world of a metaverse? The earliest court decisions now being seen indicate the answer can be “yes.”

One such decision concerned intellectual property. *Hermès* was a trademark infringement action brought by a luxury fashion business concerning activity in a metaverse involving NFTs, i.e., “non-fungible tokens”—“units of data stored on a blockchain that are created to transfer ownership of either physical things or digital media,” such as image files. The court explained that “NFTs can link to any kind of digital media, including virtual fashion items that can be worn in virtual worlds online.” As a result, “[f]ashion brands are beginning to create and offer digital replicas of their real-life products to put in digital fashion shows or otherwise use in the metaverse.”

The plaintiff alleged that the defendant was creating and selling images of the plaintiff’s iconic “Birkin” handbag to create “MetaBirkin” NFTs that he was selling on various online platforms, at the time “for prices comparable to real-world Birkin handbags.” The defendant moved to dismiss the plaintiff’s trademark infringement claims but the motion was denied.

The defendant argued that his NFTs were a form of artistic expression that explored whether images of plaintiff’s iconic bag would have the same cultural resonance as plaintiff’s physical product, rather than being a source identifier for a product, so as to fall under a First Amendment defense for trademark infringement. But the court denied the motion to dismiss on that basis, noting that there were sufficient allegations that the defendant “entirely intended to associate the ‘MetaBirkins’ mark with the popularity and goodwill of Hermès’s Birkin mark, rather than intending an artistic association.” In particular, the court cited defendant’s alleged statement that he “wanted to see as an experiment if [he] could create that same kind of illusion that [the Birkin bag] has in real life as a digital commodity.” Faced with such a potential crossover between metaverse and real life, the court sustained the trademark infringement claim at the pleading stage.

The court further held that even if the defendant could satisfy the “artistic relevance prong” of this defense, the amended complaint was still sufficient because of its factual allegations that the defendant’s use of the mark was “explicitly misleading,” citing allegations of consumer and media confusion about whether the defendant’s NFT sales were made “in partnership” between plaintiff and defendant. Here too, the court saw potential crossover between events in the metaverse and real-life effects and injuries.

The court thus held plaintiff able to proceed on its claim for trademark infringement arising from the defendant’s sale of digital products using plaintiff’s mark for use by purchasers in the metaverse.

Consumer Protection in the Metaverse

The recent decision in *Doe*, by contrast, arose more out of a consumer fraud/protection context. *Doe* concerned the defendant’s sales of in-game currency that could be used spend on virtual items for consumers’ avatars in the metaverse that the defendant owned and operated. The plaintiff, a minor, alleged that the defendant incentivized its user base (who like her were mostly minors) to purchase such items, and took a cut of the profits, but then secretly deleted some items without warning. Plaintiff alleged defendant did this in order to induce users to buy more items and not, as defendant claimed, because certain items that were sold violated defendant’s terms of use.

The plaintiff alleged that this “deletion scheme” was an “unlawful business practice” under California law and was fraudulent. The defendant moved to dismiss the claims about its metaverse behavior on various grounds but plaintiff’s claims were largely upheld.

The court rejected defendant’s argument that plaintiff’s claims were barred by the defense provided under §230 of the Communications Decency Act of 1996 (CDA), 47 U.S.C. §230. The court agreed that defendant was a “provider ... of an interactive computer service” and the information at issue was “information provided by another information content provider,” as CDA §230 requires. However, because it was other users in the metaverse who had created the virtual items in question, the court held that plaintiff was not seeking

to treat defendant “as a publisher or speaker of the user-generated content,” which CDA §230 also requires. Because plaintiff sought to impose liability for defendant’s “failure to disclose that it can delete previously purchased items with no warning,” defendant was thus “essentially functioning as a seller of virtual merchandise, not a publisher of information” as required by CDA §230.

Defendant also argued against the unfair trade practice and fraud claims that the alleged removal of purchased items “does not offend an established public policy and is not immoral, unethical, oppressive, unscrupulous, or substantially injurious to customers.” The court, however, largely sustained those claims. It held that the plaintiff “adequately alleged that reasonable consumers would have been misled by [the defendant’s] conduct” in removing the purchased items,” and that defendant’s conduct “would plausibly induce reasonable consumers to believe at least that their purchased virtual items would not be deleted” for the reasons defendant now cited. Whether this alleged practice was sufficiently disclosed in defendant’s Terms of Use was deemed a fact question not suited for resolution at the pleading stage. “A reasonable consumer could rely on [defendant’s conduct marketing and selling the virtual items and, reasonably, be unaware of the ‘small print’ equivalent of the dense, lengthy terms of use.”

Defendant also argued that “in-game currency and in-game purchases [were] not, as they must be, ‘goods or services’” under certain of the state statutory claims plaintiff asserted. The court disagreed, terming the practices in question a “transaction” that “results in the ‘sale of services,’” given that the defendant “provides users access to its metaverse, which is comfortably classified as an online entertainment service.” The court explained that “when a consumer buys in-game currency, she is engaging with the online entertainment service in one of the key ways consumers are intended to. That transaction is at the core of the ‘service.’” The court also held that nothing in the state statutes or their legislative history “showed an intent to exempt things like in-game currency” from their reach.

Business and Competition Practices in the Metaverse

Epic Games was a post-trial decision in the long-running antitrust litigation challenging Apple's contractually charging a 30% commission on purchases made through its App Store, such as those relating to plaintiff Epic Games' flagship video game product Fortnite. The plaintiff raised various antitrust claims for restraint of trade and monopolization about these practices under §§1 and 2 of the Sherman Act, among other provisions, and Apple countersued for breach of contract.

In order to determine the relevant market for antitrust purposes, the court explained that it needed to engage in a heavily factual inquiry about "the industry and the markets in that industry." This was the context in which the court made the comments and findings noted above about the extent to which the metaverse might differ from current conceptions and modes of the video gaming market.

In this regard, the court noted that plaintiff's "plans for Fortnite and its metaverse involved shifting the video game from primarily relying on the former modes (i.e., developer designed, traditionally gaming, and competitive modes) to the latter modes (i.e., social and creative modes), where users-becoming-creators would themselves be rewarded and enriched." It explained the plaintiff's position as being that "the metaverse is the future of both gaming and entertainment," and that Apple's policies, practices and platform fees were "a hurdle which pose a problem," and in fact "'an existential issue' to both the company's business plans and [its founder's] personal ambitions for Fortnite, its digital gaming and retail store, and the evolving metaverse."

Following an exhaustive factual analysis of the record post-trial, the court ultimately defined an antitrust product market in the case for "mobile gaming transactions" that was a subset of an overall gaming market that excluded certain devices and streaming services. The court found the geographic reach of this market to be global (except for China, due to differing phone operating systems used there). Nothing in the court's market definition, however, turned on drawing any lines between the "metaverse" and video games generally, given the court's observations about how the two were not easily distinguishable or perhaps were "converging."

The Nature of In-Metaverse Assets

Another recent case, while never actually mentioning the term "metaverse," nevertheless discussed the nature of the in-game currency used in the same metaverse that was discussed in *Doe*. In *Chaves v. Amazon.com Servs.*, 2022 WL 1908827 (W.D. Wash. May 23, 2022), the plaintiff purchased through Amazon \$10 gift cards for in-game currency to be used in that metaverse. She complained that she was charged sales tax on these purchases despite Amazon's alleged policy not to charge sales tax on the purchase of gift cards.

Amazon moved to dismiss and the magistrate judge recommended that the motion be granted. The court explained that "[t]he rationale behind exempting gift cards from taxation is that they retain a specified cash value and thus a taxable event occurs only if and when those funds are utilized to purchase an item in the future." But the court explained that the gift card here "is not a monetary gift card because what is purchased is imaginary game currency, ... not \$10 to be used to purchase items in the [metaverse] store" (emphasis in original).

"The cards sold by Amazon are not issued in denominations of U.S. currency; rather, the cards are issued in denominations of [the metaverse's in-game currency]." The court also pointed to language on the metaverse website stating that the in-game currency has "no value in real currency." Thus, "once customers buy [the] Cards, they have already exchanged money for [the metaverse's] game items, which may then be used as a form of exchange in the virtual game world."

The plaintiff also argued that the gift cards were "untaxable 'digital goods' or 'virtual goods'" under New York or Massachusetts law, allegedly because they constituted a form of software. But the court cited authority that prewritten software products that were considered a form of "tangible personal property," the sale of which was subject to taxation, and that computer games fell into this category. Indeed, the metaverse's website "makes clear that what a customer receives in buying [the in-game currency] is 'only a limited, non-refundable, non-transferable, revocable license to use [that currency]; i.e., access to an online gaming feature,' thus making the gift card 'taxable as tangible property under New York and Massachusetts law.'"

What Next?

Speculation is already running rampant about what developments in the metaverse might mean for litigation. Areas such as data privacy, consumer fraud, cryptocurrency fraud and class actions are already being discussed, as well as issues of personal consent, civil liberties and national security implications, with some predicting “significant exposure to liability” for some metaverse participants. See Christine Schiffner, [“Plaintiffs Firms Eye Metaverse as Growth Target for Litigation”](#), Nat’l L.J., June 6, 2022.

When it comes to the legal industry, increasing numbers of law firms are reportedly planning or at least considering metaverse presences, particularly with an eye toward millennial and GenZ clients who “understand what moving around in the metaverse actually means.” But concerns remain about maintaining privacy, confidentiality and attorney-client privilege when legal services are rendered in the online metaverse environment. See Christine Schiffner, [“Is the Metaverse Plaintiffs Firms’ New Chatbot?”](#), Nat’l L.J., June 7, 2022.

Conclusion

No matter how virtual the worlds created by metaverse developers may be, those worlds and the activity in them are directed ultimately by human beings or legal entities, and their activity is directed ultimately toward other human beings or legal entities. Those human beings and entities live in our physical world. It seems hard to escape the conclusion that courts will view them and their actions as being subject to the jurisdiction of our courts and subject to society’s ordinary laws—no less so than if a tort were committed by someone wearing a costume or mask, or against another person wearing a costume or mask. The cases seen to date thus suggest that such meta-claims from the metaverse will nonetheless be subject to adjudication in our familiar analog courts, and under the ordinary common-law and statutory legal principles that already guide society.



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